

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NOEL LYONS

Claimant

VS.

SOUTHWESTERN BELL TELEPHONE COMPANY

Respondent

Self-Insured

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Docket No. 184,807

ORDER

Respondent appeals from the August 27, 1996, Award On Remand entered by Administrative Law Judge Floyd V. Palmer. The Appeals Board heard oral argument on March 4, 1997.

APPEARANCES

Claimant appeared by his attorney, Judy A. Pope of Topeka, Kansas. Respondent appeared by its attorney, Derek J. Shafer of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award on Remand and the June 1, 1995, Award. In addition, the Appeals Board considered the November 9, 1994, deposition of Noel Lyons.

ISSUES

- (1) The nature and extent of claimant's disability.
- (2) Whether the 1993 amendments to K.S.A. 44-501(h) are applicable to this claim such that respondent would be entitled to an offset for certain retirement benefits against any permanent partial or permanent total disability award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award On Remand entered by the Administrative Law Judge should be affirmed.

The findings of fact and conclusions of law enumerated in the Award On Remand by the Administrative Law Judge are found to be accurate and appropriate and are hereby adopted by the Appeals Board as its own as if specifically set forth herein. The Appeals Board agrees that claimant has sustained his burden of proving a permanent total disability, following Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

The Appeals Board further finds that the enactment of K.S.A. 44-501(h) by the 1993 legislature is a substantive and not a procedural change. Absent express language in the statute, it cannot be applied retroactively to a claim arising out of a 1992 accident. Harding v. K.C. Wall Products, Inc., 250 Kan. 655, 831 P.2d 958 (1992); Eakes v. Hoffman-LaRoche, Inc., 220 Kan. 565, 552 P.2d 998 (1976). The Board finds no such legislative intent either expressed or implied. K.S.A. 44-501(h) must, therefore, operate prospectively. Accordingly, respondent is not entitled to an offset for claimant's retirement benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award On Remand entered by Administrative Law Judge Floyd V. Palmer dated August 27, 1996, should be, and the same is hereby, affirmed in all respects. The orders contained in the Award on Remand are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Judy A. Pope, Topeka, KS
Derek J. Shafer, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director

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ORDER

Claimant appeals from the November 15, 1996 Order denying penalties entered by Administrative Law Judge Floyd V. Palmer. The Appeals Board heard oral argument on March 4, 1997.

APPEARANCES

Claimant appeared by his attorney, Judy A. Pope of Topeka, Kansas. Respondent appeared by its attorney, Derek J. Shafer of Topeka, Kansas.

ISSUES

On December 18, 1995, the Appeals Board entered an Order finding claimant's injuries resulted from a work-related "accident" and remanded the case to the Administrative Law Judge to determine the remaining issues.

On August 27, 1996, the Administrative Law Judge entered an Award On Remand which states, in pertinent part:

"1. Claimant is entitled to permanent total general bodily disability at the rate of \$289.00 per week. As of August 15, 1996 there would be due and owing to the claimant 221.43 weeks at \$289.00 per week or \$63,993.27,

which is ordered paid in one lump sum. Thereafter, the remaining balance of \$61,006.73 shall be paid at \$289.00 per week for 211.10 weeks or until further order of the Director.

“2. Claimant is awarded reimbursement for medical expenses as found in the findings above, which are incorporated herein by reference, as authorized medical pursuant to K.S.A. 44-510(b), upon submission of proper itemized statements.”

Claimant sent a demand to the respondent following both Orders. Respondent did not pay benefits. Claimant, therefore, filed a Motion for Assessment of Civil Penalties, which was denied by the Administrative Law Judge. Claimant requests review of the Administrative Law Judge's Order and specifically requests that the Board reverse and enter an Order directing respondent to pay claimant's past due compensation, plus an award of penalties and reasonable attorney fees.

Respondent raises an issue concerning the jurisdiction of the Appeals Board to review the Administrative Law Judge's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following is a brief chronology of the pertinent procedural history of this claim:

June 1, 1995:	Award entered by Administrative Law Judge denying compensability of the claim.
June 6, 1995:	Claimant's Application for Workers Compensation Board Review of the Award.
December 18, 1995:	Order of Appeals Board finding claim compensable and remanding case to the Administrative Law Judge for determination of other issues.
January 11, 1996:	Respondent's Notice of Appeal of Board's Order on compensability to Court of Appeals.
January 23, 1996:	Claimant's certified demand for compensation.
May 9, 1996:	Court of Appeals Notice that it would <i>sua sponte</i> review whether respondent's appeal was filed prematurely.
August 27, 1996:	Administrative Law Judge's Award On Remand.
August 29, 1996:	Claimant's certified demand for compensation.

September 6, 1996: Respondent's Application for Review of Award On Remand, stating as issues:

1. Whether claimant is permanently and totally disabled;
2. The percentage of permanent partial disability, if any; and,
3. The applicability of credit pursuant to K.S.A. 44-501(h) to this claim.

September 27, 1996: Claimant's Motion for Assessment of Civil Penalties.

November 15, 1996: Administrative Law Judge's Order denying penalties, based on:

1. Opinion that respondent's appeal to Court of Appeals was filed prematurely; and
2. Opinion that since the Board has "plenary power to conduct trial de novo," compensability is still an issue pending before the Appeals Board.

November 25, 1996: Claimant's Application for Workers Compensation Board Review of Administrative Law Judge's Order denying penalties.

February 28, 1997: Memorandum Opinion by the Kansas Court of Appeals affirming the Appeals Board's Order of December 18, 1995.

March 31, 1997: Respondent's Petition for Review to the Kansas Supreme Court.

We will first address the question raised by respondent concerning the Board's jurisdiction to review the Administrative Law Judge's Order denying penalties. The Appeals Board has consistently held that it has jurisdiction to hear an appeal from an order on an application for penalties under K.S.A. 44-512a. See, e.g., Harvell v. Superior Industries International, Inc., Docket No. 176,051 (December 1993); and Lawson v. City of Kansas City, Kansas, Docket No. 170,193 (June 1996).

The Kansas Supreme Court has held that a proceeding pursuant to K.S.A. 44-512a supersedes the prior award, and establishes a new right, rather than being a mere collection technique. See Griffith v. State Highway Commission of Kansas, 203 Kan. 672, 456 P.2d 21 (1969); Kelly v. Phillips Petroleum Co., 222 Kan. 347, 566 P.2d 10 (1977). Therefore, a proceeding under K.S.A. 44-512a can be maintained while the award is on appeal. Furthermore, unlike a preliminary hearing order pursuant to K.S.A. 44-534a, a penalty order

is a final order which is appealable to the Appeals Board and beyond. Wain v. Clarkson Constr. Co., 18 Kan. App. 2d 729, 861 P.2d 1355 (1993). However, the remedy is limited during an appeal to the appellate courts. K.S.A. 44-556(b); Kelly, supra; and Stout v. Stixon Petroleum, 17 Kan. App. 2d 195, 836 P.2d 1185 (1992).

In Kissick v. Salina Manufacturing Co., Inc., 204 Kan. 849, 466 P.2d 344 (1970), the Court held that the use of K.S.A. 44-512a “is the means by which the legislature intended all compensation due and payable should be enforced, including that which is due pending appeal.”

In Hatfield v. Wal-Mart Stores, Inc., 14 Kan. App. 2d 193, 196-197, 786 P.2d 618 (1990) the Court said:

“The overriding purpose of the Workers Compensation Act is to secure prompt payment to injured employees of the benefits provided for under its terms.”

K.S.A. 44-512a states, in pertinent part:

“(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due . . . the employee shall be entitled to a civil penalty . . . for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill”

Claimant made formal demand on respondent for payment of compensation on at least two occasions. No compensation has been paid to claimant to date. The issues presented by claimant’s application for penalties are complicated by the unusual procedural course this case has taken. That procedure, which we have set forth above, resulted in the bifurcation of the issues concerning compensability of the claim from the issues the nature and extent of disability and the amount of compensation due claimant. Claimant filed his application for penalties based upon two separate demands for payment referencing two different orders. The first followed the Board’s Order of December 18, 1995, which reversed the Administrative Law Judge’s denial of compensation. A second demand was sent following the Administrative Law Judge’s August 27, 1996, Award On Remand. The Board’s Order was appealed to the Court of Appeals and respondent’s Petition for Review to the Kansas Supreme Court is pending. The Administrative Law Judge’s Award On Remand was appealed to the Board and that appeal was very recently decided.

K.S.A. 44-551(b)(2)(C) states, in pertinent part:

“In any case in which the final award of an administrative law judge is appealed to the board for review under this section and in which the

compensability is not an issue to be decided on review by the board, medical compensation shall be payable in accordance with the award of the administrative law judge and shall not be stayed pending such review.”

The Administrative Law Judge’s Award On Remand was appealed for review by the Board. Claimant argues compensability was not an issue to be reviewed. Respondent contends that it was. The Appeals Board considers its Order of December 18, 1995, finding this claim compensable to be the law of the case. However, because a Petition for Review of the Court of Appeals’ decision which affirmed the Board’s Order is pending before the Supreme Court, the Appeals Board finds that compensability has not been finally determined.

K.S.A. 44-556(b) states, in pertinent part:

“Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board’s decision and for the period of time after the board’s decision and prior to the decision of the court of appeals on review.”

Respondent did request review of this Board’s December 18, 1995 Order by the Court of Appeals and, by its decision, the Court of Appeals found the Board’s Order to be a final appealable order. Thus, by the language of K.S.A. 44-556(b), compensation should be paid by respondent if compensation was awarded.

In his Order denying penalties, the Administrative Law Judge incorrectly predicted that respondent’s appeal to the Court of Appeals would fail on jurisdictional grounds. However, the Court of Appeals decided that issue differently. Therefore, while respondent’s appeal is pending, respondent must pay the “compensation due.” However, the issue of nature and extent of disability was remanded to the Administrative Law Judge. Therefore, the question becomes what compensation was due and when.

K.S.A. 44-501(a) states:

“If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.”

The Board determined that the claimant was injured by accident arising out of and in the course of his employment and that he is entitled to compensation. Respondent correctly argues that the Board did not order a specific amount to be paid in its Order of December 18, 1995. As such, the respondent had no specific liability.

In Krueger v. Hoch, 202 Kan. 319, 447 P.2d 823 (1968), the claimant appealed when the employer ceased payments upon filing of the Supreme Court's decision although the claimant had filed a motion for rehearing. The Supreme Court noted by the plain language of K.S.A. 44-556, the right of appeal to the Supreme Court is qualified by the requirement that compensation payable under an award of the trial court be not stayed. In other words, continuance of payments awarded by the trial court is a prerequisite of the right to appeal as well as a requirement pending appeal. In Hollingsworth v. Fehrs Equip. Co., 240 Kan. 398, 729 P.2d 1214 (1986), the court noted the purpose of the Workers Compensation Act is to provide an established source of benefits to the employee for injuries arising out of and in the course of employment and to shift from the employee to the industry certain burdens incidental to modern industrial operations.

Respondent stipulated that claimant sustained functional impairment of 35 percent. Because compensability remains an issue on appeal, respondent can refuse to pay claimant even at that stipulated minimum level. K.S.A. 44-512a requires that there be an award of compensation. No specific amount of disability compensation was awarded prior to the Administrative Law Judge's August 27, 1996 Award On Remand.

The December 18, 1995 Order of the Appeals Board states:

"Claimant has sustained personal injury by accident arising out of and in the course of his employment with the respondent for which he is entitled [to] benefits under the Workers Compensation Act."

The case was then remanded to the Administrative Law Judge for a determination of the remaining issues, including the nature and extent of claimant's disability.

The absence of a specific order as to a percentage of permanent disability in the Board's December 18, 1995 Order may not excuse the respondent from any payment. Where there is a stipulation as to the percentage of functional impairment, this becomes the minimum amount of permanent partial general disability. K.S.A. 1992 Supp. 44-510e(a). However, the absence of a specific order does, in the opinion of the Board, relieve respondent from civil penalties under K.S.A. 44-512a until such time as the Award On Remand was entered. Claimant may have a remedy under K.S.A. 44-512b for respondent's failure to pay the minimum amount of compensation that would be due pursuant to the stipulation as to functional impairment. Under that statute, failure to pay compensation prior to award without just cause can result in an interest penalty.

Should respondent ultimately prevail on the issue of whether claimant sustained personal injury by accident which arose out of and in the course of his employment, K.S.A. 44-556(d)(1) provides relief to respondent for the compensation it paid to claimant. It states:

"If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by

the employer or the employer's insurance carrier during the pendency of review under this section and the amount of compensation awarded by the board is reduced or totally disallowed by the decision on the appeal or review, the employer and the employer's insurance carrier, except as otherwise provided in this section, shall be reimbursed from the workers compensation fund"

With regard to the payment of medical compensation, respondent is correct when it questions whether claimant's Motion for Assessment of Civil Penalties is appropriate given the provisions of K.S.A. 44-512a. The penalties statute clearly states that penalties are only appropriate "if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail" A review of claimant's pleadings and attachments thereto reflects that the demand made for payment of compensation on January 23, 1996, simply requested "compensation due from October 9, 1995 until a decision is made by the court of appeals." The demand letter dated August 29, 1996, referred to the August 27, 1996 Award by Administrative Law Judge Floyd V. Palmer as to permanent total general bodily disability payment and, as to medical compensation, utilized the award language of Judge Palmer, which included the following language: "upon submission of proper itemized statements." Respondent asserts it is unaware of having received a proper itemized statement. An indication that no itemized statement was presented is found in claimant's October 12, 1994 submission letter at page 13, under Section VI: The claimant is entitled to reimbursement for medical expenses, where it states:

"All treatments provided to Mr. Lyons for his current back ailment should be considered 'authorized' treatment and should be reimbursed through Southwestern Bell's workers' compensation self insurance fund. Mr. Lyons respectfully requests an order for reimbursement of all of his outstanding medical bills to date and all bills paid by his health insurer as authorized to be paid by Southwestern Bell's self insurance. In the alternative, Mr. Lyons requests an order holding him 'harmless' for all outstanding medical incurred to date or paid by the his health insurer to date."

The record does not reflect that there has ever been a specific itemization of medical supplied. Therefore, to the extent claimant is seeking penalties for respondent's failure to pay for or reimburse money claimant has paid for his own medical care herein, there has been no requisite itemization and respondent can not be penalized for failing to do that which claimant's failure to supply information has prohibited it from doing. See Amro v. The Boeing Co. - Wichita, Docket No. 183,411 (January 1996).

At the time of the October 23, 1996 hearing before the Administrative Law Judge on Claimant's Motion for Assessment of Civil Penalties, payment of the compensation awarded by the Administrative Law Judge in his August 27, 1996 Award On Remand was stayed by virtue of respondent's appeal of that Award to the Appeals Board. However, arguments on that appeal were presented to the Board on March 4, 1997. Pursuant to K.S.A.

44-551(b)(2)(B), the compensation awarded by the Administrative Law Judge became due and payable 30 days after arguments were presented. Accordingly, payments pursuant to the Award On Remand are no longer stayed and the remedies provided by K.S.A. 44-512a would now be available as to those payments.

The Appeals Board finds that the Administrative Law Judge's denial of claimant's request for penalties should be affirmed in that no penalties can arise from respondent's failure to pay medical and disability compensation because claimant failed to perform the statutory requirement with regard to itemization of same, because compensability remains an issue before the appellate courts, and because compensation was not awarded in the Board's December 18, 1995 Order.

Therefore, an award of penalties against respondent and in favor of claimant is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order denying penalties entered by Administrative Law Judge Floyd V. Palmer dated November 15, 1996, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Judy A. Pope, Topeka, KS
Derek J. Shafer, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director